Special Education Law Update

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IDEA Regulation Update

Maintenance of Effort (MOE)

New IDEA regulations were published on April 28, 2015 making the following amendments:
1. If a Local Education Agency (LEA) fails to meet MOE, the level of expenditures required in the subsequent fiscal year is the level of effort that would have been required in the absence of that failure and not the actual reduced level of expenditures by the LEA. (34 CFR 300.203(c))
2. In addition, if the LEA fails to maintain its level of expenditures for the education of children with disabilities and therefore does not meet the MOE requirements, the State Education Agency (SEA) is liable in a recovery action. The SEA would be liable to return to U.S. Department of Education, using nonfederal funds, either the amount by which the LEA failed to maintain its level of expenditures in that fiscal year or the amount of the LEA's Part B subgrant in that fiscal year, whichever is lower. (34 CFR 300.203(d))

The United States Department of Education issued a question and answer guidance document to more fully explain the MOE final regulations issued. The document can be found at: https://osep.grads360.org/#program/fiscal

Federal Policy Update

Policy Statement on Inclusion of Children With Disabilities in Early Childhood Programs (United States Department of Education and United States Department of Health and Human Services (September 2015))

A joint policy statement was issued by the Departments of Education (ED) and Health and Human Services (HHS) regarding inclusion in early childhood programs. The ED and HHS highlight their concerns that children with disabilities and their families continue to face significant barriers to accessing inclusive high-quality early childhood programs and too many preschool children with disabilities are only offered the option of receiving special education services in settings separate from their peers without disabilities.

The guidance states that "all young children with disabilities should have access to inclusive high-quality early childhood programs, where they are provided with individualized and appropriate support in meeting high expectations."

The policy document contains recommendations for both state level and local agencies.

Case Law Update

I. Child Find/Evaluation Issues

A. A student attended her local public school from K-8. While in school the student began exhibiting signs of emotional difficulty, including frequent unscheduled visits to the school nurse and guidance counselor, self-injurious threats and behavior, declining academic performance, and numerous unexcused absences. The school never conducted a special education evaluation of the student.

The parent had taken the student to a psychologist who diagnosed the student as having depression and recommended she receive wrap around behavioral health services. The school was never given the psychologist's report.

The parents then withdrew the student and enrolled her in a cyber charter school. The cyber school initiated a special education evaluation which found that the student was eligible for special education as a student with an emotional disturbance. An IEP was developed.

The parent then filed a due process hearing against the former public school alleging a violation of child find obligations. The Court, in affirming the hearing officer, held that a child find violation occurred. The Court found no merit to the school's argument that it should not be held accountable for failing to identify the student as a student in need of an IDEA evaluation because her father neither provided the school with her psychological evaluations nor requested that the school evaluate her for special education services. The Court concluded that "While no piece of evidence alone conclusively demonstrated her need for an evaluation, the mosaic of evidence in this case clearly portrays a student who was in need of a special education evaluation." As a result the student was denied a

FAPE which entitled her to compensatory education. Jana K. v. Annville Cleona School District 63 IDELR 278 (United States District Court, Middle District, Pennsylvania (2014)).

B. A student who was a sophomore in high school was diagnosed as having multiple sclerosis. She was a very strong academic student who had plans to pursue her studies at the University level.
After the diagnosis, the school in collaboration with the parent developed a Sec. 504 Plan with accommodations to address fatigue, pain and decreased strength. Even with these accommodations, the student's return to school for the last month of the school year was difficult. She struggled to catch-up with assignments and tests she had missed. She felt fatigued, had trouble walking, and found that it took three times longer to complete assignments.
Her parents enrolled her in another public high school the following year. They met with the principal and counselor to review her Sec. 504 plan from the previous high school and discuss potential eligibility for IEP services. The counselor stated that the student would not be IEP eligible but that the Sec. 504 accommodations would be provided.
The parents filed for a due process hearing alleging that both high schools violated their child find responsibilities in not finding the student eligible for special education as a student with another health impairment.
The Court affirmed the hearing officer in finding that the first high school did not violate its child find obligations since there was such a short period of time between the diagnosis of MS and the end of the school year. However, the Court found that the second high school should have evaluated the student for IEP services. The evidence showed that the student continued to have needs associated with her MS that, despite 504 accommodations, adversely impacted her academic performance. Her MS caused her to miss school repeatedly which caused her to fall so far behind that even some of her teachers said she would never be able to catch up. She suffered from depression, experienced panic attacks, and was under incredible stress because of her academic difficulties. She could not attend school in the mornings, when her symptoms were most severe, so she would take online courses, with a remedial curriculum, because she had no other alternative. The lack of a special education evaluation denied her a FAPE. Simmons v. Pittsburgh Unified School District 63 IDELR 158 (United States District Court, Northern District, California (2014)).

C. The Court held that the school district did not violate the IDEA when a functional behavioral assessment (FBA) was conducted without parent consent since it was not considered an evaluation under the IDEA. The school psychologist merely reviewed existing data to determine if additional assessments were necessary.
FBAs which are administered for the limited purpose of adapting teaching strategies to a child's behavior, as opposed to determining eligibility or

changes in placement, fall outside of the evaluation requirements of the IDEA.
The targeted purpose of the FBA was not to influence the student's placement, but to guide interactions between instructors and the student in the course of teaching the curriculum. Therefore, in this case, the FBA was akin to a "screening . . . to determine appropriate instruction strategies for curriculum implementation," which is not the same as an evaluation. West-Linn Wilsonville School District v. Student 63 IDELR 251 United States District Court, Oregon (2014))

D. A 13 year old student with autism had a behavior component in her IEP based on an independent educational evaluation conducted at school district expense. The student received supports, including a one to one support aide, provided by the Center for Autism and Related Disorders (CARD). The next school year the parents made a numerous requests for a reevaluation of the student's behavior based on the student's worsening behavior including aggressive behavior which posed a threat to her health and safety.
The school took the position that the student's behavior was continuously assessed by CARD's support services which functioned as an informal assessment. The CARD assessment was based on the support aide's observation of the student as well as data she collected on the student's maladaptive behavior.
The Court held that the school failed to properly assess the student's behavior which denied the student a FAPE. The data collected through observations by the support aide does not meet the IDEA's requirement that a school "use a variety of assessment tools and strategies". In addition, the support aide was not qualified to conduct a behavioral assessment.
The student's maladaptive behaviors resulted in her being removed from the classroom on several occasions which interfered with her ability to learn and access information. As a result, she was denied educational benefit. M.S. v. Lake Elsinore Unified School District 66 IDELR 17 (United States District Court, Central District, California (2015)).

E. The parents of a student who was being home schooled and also enrolled in the school district's H.O.M.E. to supplement the home schooling challenged the Team's determination that their student was not eligible for special education. The parent requested an independent educational evaluation (IEE). The Director of Special Education promptly granted the request and included resources for obtaining an IEE and the district criteria.
The parent wanted a particular clinical psychologist to conduct the IEE. The IEE was conducted over 20 months later. The IEE report was given to the school two years after the initial request for an IEE was granted. The school district then met with the parents and indicated that it would be

treating the IEE as a new referral for special education. The parents refused to consent to any new evaluation. The parent then requested a due process hearing seeking a private school placement including services recommended by the IEE.

The Court of Appeals, in affirming the District Court's Summary Judgment order for the school district, held that the school district complied with the IDEA regarding the IEE. There was no evidence that the school district bears any responsibility for the long delay in conducting the IEE. The parents never responded to the emails sent by the Director inquiring who the parents selected as the IEE. Most importantly, the Court observed that the IDEA prohibits the school district from requiring the parents to conduct the IEE promptly or interfering with their choice. The Court stated that nothing in the IDEA prohibited the school district from treating the IEE submitted over two years after the student had been deemed ineligible as a new referral for special education. Magnum v. Renton School District 63 IDELR 277 (United States Court of Appeals, 9th Circuit (2014)) Note: This is an unpublished decision. Appeal to the Supreme Court denied. (2015)

F. The parents of a student with autism emailed the school district to request an IEE at public expense. The school district granted the request. In its response, the school district stated that the assessment must follow the requirements outlined in state policy and provided a link to an online version of the state policy document. In addition, the school imposed a financial cap on the IEE with the provision that the parents may submit additional information as to why the limit should be exceeded.

The IEE conducted did not follow the state policy requirements and therefore the school district refused to reimburse the parents. When the school district notified the parents that the IEE was not compliant with state policy, it invited the independent evaluator to contact the school district regarding the areas of non-compliance. There was no evidence that such contact was made.

The Court upheld the school district's denial of reimbursement of the IEE. First, the Court upheld the method the school district used to inform the parent of the district's criteria in conducting an IEE. The parents cited no legal authority suggesting that the IDEA requires public agencies to provide parents with any additional or different form of notice, such as a checklist. Therefore, the Court concluded that school district's actions complied with the IDEA. Second, the Court noted that the IDEA requires that "the criteria under which the evaluation is obtained ...must be the same as the criteria that the public agency uses when it initiates an evaluation ..." A public agency is not obligated to reimburse parents of the cost of a privately-obtained IEE unless the evaluation satisfies this requirement.

Lastly, the Court rejected the parents' contention that by failing to request a due process hearing following their request for an IEE at public expense,

the school district waived its right to object to reimbursing the parents for the cost of the IEE. The Court restated that the school district was not obligated to reimburse parents for the cost of a privately-obtained IEE unless the evaluation satisfies certain requirements, including compliance with agency criteria. Accordingly, the Court found the argument that the school district has somehow waived its right to object to reimbursing the parents lacked merit. B. v. Orleans Parish School District 64 IDELR 301United States District Court, Eastern District, Louisiana (2015)). On Appeal.

G. The Court held that the parents were entitled to an IEE at public expense. In this matter, the school district did not meet its burden of proving its reliance on a previous school district's evaluation was appropriate. The previous school district evaluated the student when he was placed in a Juvenile Detention Center located in the district. The Court found that the district of legal residence should have conducted a new evaluation when the student was discharged from the Detention Center and reentered high school in his district of residence. D.A. v. Meridian Joint School District No. 2 65 IDELR 253 (United States Court of Appeals, 9th Circuit (2015).

H. The United States Department of Education issued a guidance letter stating that a parent may request an Independent Educational Evaluation at school district expense if they feel that the school did not assess all of the students educational needs. Specifically, the letter states:

> When an evaluation is conducted in accordance with 34 CFR §§ 300.304 through 300.311 and a parent disagrees with the evaluation because a child was not assessed in a particular area, the parent has the right to request an IEE to assess the child in that area to determine whether the child has a disability and the nature and extent of the special education and related services that child needs.

Letter to Baus 65 IDELR 81 (United States Department of Education, Office of Special Education Programs (2015))

II. Eligibility Issues

A. A student with autism was found ineligible for special education based on the Team's conclusion that there was no adverse affect on the student's educational performance. The Team based its decision on the school's evaluation and two independent educational evaluations.
The Court of Appeals in a Memorandum Decision, affirmed the decisions by the Eligibility Team, the Hearing Officer and the District Court that the student was not eligible for special education. Although the student had Asperger's Syndrome, the Court held that the evidence did not support the student's disability having an adverse effect on his educational

performance putting him in need of special education.
Although the parents alleged that the school district focused too much on the student's academic performance, the hearing officer and the district court noted that the student had done well in classes that also emphasized pre-vocational and life skills. Therefore, the Court noted that in making the eligibility decision, the Team considered both academic and non-academic factors in reaching its conclusion. D.A. v. Meridian Joint School District No. 2 65 IDELR 286 (United States Court of Appeals, 9th Circuit (2015).

B. The U.S. Office of Special Education (OSEP) issued a Memo to State Directors reminding them that although the IDEA does not specifically address "twice exceptional" students (students with disabilities who have high cognition) " It remains the Department's position that students who have high cognition, have disabilities and require special education and related services are protected under the IDEA and its implementing regulations."
OSEP asked the State Directors to "widely distribute" a previous OSEP guidance letter, Letter to Delisle (62 IDELR 240), to the LEAs in the state and remind each LEA of its obligation to evaluate all children, regardless of cognitive skills, suspected of having one of the 13 disabilities outlined in 34 CFR Section 300.8.
OSEP further clarified that it would be inconsistent with the IDEA for a child, regardless of whether the child is gifted, to be found ineligible for special education and related services under the SLD category solely because the child scored above a particular cut score when determining if there is a severe discrepancy between intellectual ability and achievement. Memorandum to State Directors of Special Education,15-08 115 LRP 18455 (United States Department of Education, Office of Special Education Programs (2015)).

C. A student who was experiencing reading difficulties received additional reading instruction under the school's response to intervention (RTI) system of general education supports. The RTI system was available to all students who were experiencing educational difficulties. The parent subsequently made a referral for a special education evaluation to determine whether their student had a specific learning disability.
The school conducted the evaluation and convened an eligibility team meeting. The team applied the severe discrepancy criteria which the school district adopted (as opposed to the RTI process) for determining whether the student was eligible for special education as having a learning disability. The student was eventually found eligible under the category specific learning disability. The parent never received the RTI data collected for the student nor was it discussed at the IEP Team meeting. The parent initiated a due process hearing challenging the evaluation process and the appropriateness of the IEPs in light of independent

educational evaluations they obtained. They sought reimbursement for the IEEs and the private reading program they paid for.

The Court of Appeals (in a 2-1 decision), in reversing the District Court, held that the school district violated the IDEA by failing to insure that the "complete" RTI data was documented and carefully considered by the entire IEP team and failing to furnish the parents with the data. As a result the Court concluded that the parent's right to be meaningful participants in the decision making process was significantly impacted and rendered them unable to give informed consent for both the initial evaluation and the special education services. Therefore, FAPE was denied.

The Court rejected the school's argument that the IDEA's RTI regulations were not applicable since the school had adopted a severe discrepancy criteria for determining eligibility. There is no authority to support the contention that the IDEA's RTI requirements are limited only when RTI criteria is used to determine eligibility.

The Court noted that the IDEA requires that in determining eligibility and the educational needs of the student the team must draw upon information from a variety of sources. The school district must "ensure that the information obtained from all of these sources is documented and carefully considered". (34 CFR 300.306(c)(1)) In addition, the IDEA regulations applicable to students suspected of having a specific learning disability require that the team ensure the underachievement is not due to a lack of appropriate instruction. Specifically, the team must consider:

> 1. Data that demonstrates that prior to, or as part of the referral process, the child was provided appropriate instruction in regular education settings, delivered by qualified personnel; and
>
> 2. Data based documentation of repeated assessments of achievement at reasonable intervals, reflecting formal assessments of student progress during instruction, which was provided to the child's parents.

(See 34 CFR 300.309(b)(1) and (2))

The Court remanded the case to the District Court to determine the relief to be granted for the denial of FAPE. M.M. v. Lafayette Board of Education 64 IDELR 31, 767 F.3d 842 (United States Court of Appeals, 9th Circuit (2014)). (Amended Opinion)

D. A student with multiple diagnoses over the years (Post Traumatic Stress Disorder, severe depression, anxiety), who abused alcohol and was a victim of sexual abuse was placed in an out of state treatment facility by her parents. The facility certified the student as being emotionally disturbed. However, the resident school district found that the student was not eligible for special education since she was deemed socially

maladjusted.
Her parents sought reimbursement for the costs of the residential treatment center. The hearing officer ordered reimbursement based on a number of procedural errors under the IDEA. On appeal, the Court remanded the case back to a different hearing officer to determine whether the student was eligible for special education under the category of emotional disturbance. The hearing officer concluded that the student was socially maladjusted, not emotionally disturbed, and therefore was not eligible for special education.
On appeal of the eligibility determination, the Court reversed. While the Court agreed that the evidence indicated that the student was socially maladjusted, there was also substantial evidence to support the conclusion that she was emotionally disturbed in at least one category -- a general pervasive mood of unhappiness or depression. The Court concluded that " it is more likely than not that her major depression, not just her misconduct and manipulation, underlay her difficulties at school. The evidence also reflects that her depression had lasted for a long time, was marked and affected her performance at school." H.M. v. Weakley County Board of Education 65 IDELR 68 (United States District Court, Western District, Tennessee (2015))

E. The Court of Appeals in a Memorandum Opinion upheld the District Court's conclusion that a student who was attending a private school was not eligible for special education as having a specific learning disability. The Court based its decision on evidence presented by public school that the public school staff's classroom observations in the private school showed that the student performed well in his classroom and was generally engaged with his class. He was receiving good grades and received only "tier one" accommodations. Tier 1 accommodations are those that are provided to all students. Hawaii Department of Education (DOE) v. Patrick P. 65 IDELR 285 (United States Court of Appeals, 9th Circuit (2015)

III. IEP/FAPE

A. The U.S. Supreme Court in Board of Education of the Hendrick Hudson Central School District, et al. v. Rowley, et al. (102 S. Ct. 3034, IDELR 553:656 (1982)) held that an inquiry in determining whether a FAPE is provided is twofold:

1. Have the procedures set forth in the IDEA been adequately complied with?

2. Is the IEP reasonably calculated to enable the child to receive educational benefits?

B. Procedural Issues

1. The parents of a student with autism challenged two IEPs for their student. The Court of Appeals affirmed the hearing officer's decision that both IEPs provided the student a FAPE.
The parents challenged the first IEP on procedural grounds alleging that neither the IEP nor the prior written notice (PWN) were sufficiently specific impacting the parent's ability to meaningfully participate. The PWN stated that the student would be placed in the "public high school in his community school". The Court affirmed the lower court's conclusion that the hearing officer properly found that the prior written notice provided to the parent was sufficient to put the parent on notice of which school was being proposed. The Court stated even if the notice did not make a sufficiently specific formal placement offer, it did not significantly restrict the parent's ability to participate in the development of the IEP.
The parents challenged the second IEP alleging that the IEP developed placing the student in a public high school program could not be implemented due to staffing shortages. The Court concluded the evidence supported the hearing officer's conclusion that the IEP could be implemented as written. The testimony included the fact that there was a contract for private service providers to be backup service providers in the event of a shortage of public school staff. Therefore, the IEP offered the student a FAPE. Marcus I. v. Hawaii Department of Education 63 IDELR 245 (United States Court of Appeals, 9th Circuit (2014)). Note: This is an unpublished decision.

2. The parent of a student with autism, sensory integration dysfunction, an intellectual disability and ADHD challenged the appropriateness of their student's IEP. The proposed IEP called for transitioning the student from a private special education school to a public classroom (6 students, 1 special education teacher, and 1 classroom paraprofessional) along with an individual 1:1 paraprofessional for three months to ease the transition. The parent kept their student at the private school and requested a due process hearing.
The parent felt the IEP was inappropriate to meet the student's academic and behavioral needs. The Court agreed and determined that FAPE required a 1:1 paraprofessional for more than three months. At the hearing, the school district psychologist testified that the 1:1 paraprofessional could have been continued beyond three months if warranted. The Court held that reliance on such testimony was improper. At the time when the parent had to decide where to place her student, the parent could not know whether the

school would offer the services of a paraprofessional for more than the three months as specified in the IEP. The Court stated that it was "inappropriate to take into account the possibility of mid-year amendments in determining whether an IEP as originally formulated was substantively adequate….We therefore think it contrary to the logic of [case law], and of the IDEA itself, to penalize her for relying upon the IEP's description of services in making the placement decision." Reyes v. New York City 63 IDELR 244 (United States Court of Appeals, 2nd Circuit (2014))

3. The parents of a student with a disability had ongoing concerns regarding their son. The school district thought that the student's mother was making too many demands on district staff and wanted to have one point of contact so that all information shared would be the same. The school district did not attempt to meet with her to attempt to resolve the issue or limit the number of communications before announcing at an IEP team meeting near the end of the school year that the School District's Director of Special Education would be the sole point of contact for IEP purposes.
The parents initiated a due process hearing alleging that FAPE was denied and requested 900 hours of compensatory education. The hearing officer determined that, before the School District limited the parent's communications with IEP team members, it should have told her that there was a problem and requested that she reasonably limit her communications or, at least, it should have warned her before imposing a limitation. Because it did not do so, the hearing officer concluded that near the end of the school year, the limitation on communications with the IEP team, coupled with some ridiculing emails, resulted in a denial of a FAPE. Four hours of compensatory education was awarded.
On appeal, the Court stated that any denial of a FAPE was limited to near the end of the school year and resulted from the limitation on the parent's communications with the IEP team. The Court held that the student was not entitled to any additional compensatory education. Stepp v. Midd-West School District 115 LRP 7892 (United States District Court, Middle District, Pennsylvania (2015)).

4. The Court of Appeals affirmed the hearing officer's decision that a student with autism was provided a FAPE. In a short memorandum decision, the Court held that the student's parents were not denied a meaningful opportunity to participate in the development of her IEP simply because the school did not clarify exactly what its offer of 30 minutes per week of social skills training entailed.
The Court also concluded that the student's parents did not provide sufficient evidence to show that the IEP was not reasonably

calculated to address the student's educational needs, in particular, her socialization needs. Relying on the testimony of a behavioral specialist, both the hearing officer and the district court determined that the student did not require a one-to-one aide. Lastly, the Court found that there was no legal violation concerning her "mainstreaming" in the general education classes at the public school. Lainey C. v. Hawaii Department of Education (DOE) 594 F.Appx. 441, 65 IDELR 32 (United States Court of Appeals, 9th Circuit (2015). Note: This is an unpublished decision.

5. The Court in a Memorandum Opinion affirmed the District Court's decision (which reversed the ALJs decision) that FAPE was denied when the school district held the IEP Team meeting in spite of the fact that the parents informed the district four days ahead of time that they would be unable to attend. A school district can make an IEP Team decision without the parents only if it is unable to obtain their participation which was not the case here.
The school district claimed that the parents could not raise the issue of parental participation since it was not included in the due process hearing complaint. The Court of Appeals held that the school district waived this argument since the district did not raise it in the District Court proceeding. D.B. v. Santa Monica-Malibu Unified School District 65 IDELR 224 (United States Court of Appeals, 9th Circuit (2015)

6. The parents of a student with autism initiated a due process hearing alleging that FAPE was denied. Among the allegations, the parents argued that the school violated their IDEA rights to be meaningful participants at their student's IEP meetings by holding two meetings during the summer while the parents were out of the country.
The Court, in affirming the hearing officer, found no violation. The school had offered numerous dates to the parents for an IEP meeting and also offered alternative means of participating through telephone or videoconferencing. The parents did not accept the offer. Further, the school recorded the summer meetings and provided them with transcripts. In addition, the parents did not attend the IEP meeting that was held after their return from their travels. Therefore, the Court concluded that there was no denial of FAPE since the school made significant efforts to involve the parents in the IEP process. Dervishi v. Stamford Board of Education 66 IDELR 6 (United States District Court, Connecticut (2015))

7. The Court of Appeals affirmed the Administrative Law Judge's decision that the student was offered a FAPE. The Court

concluded that none of the six "procedural flaws" resulted in a denial of FAPE. For example, the lack of a goal to address the student's anxiety was harmless since the school's offer included weekly counseling sessions. Also of interest was the conclusion that although the IEP did not provide the student accommodations, there was no loss of educational opportunity since accommodations were discussed by the Team and listed in the IEP meeting notes.

Finally, the Court held that the IEP calling for small group instruction provided a FAPE in the least restrictive environment. The placement was intended to be an interim placement since the student had not been in the school district for the last three years and the staff had only one opportunity to observe the student before the IEP Team meeting. Therefore, their knowledge of the student was somewhat limited. C.B. v. Garden Grove Unified School District 63 IDELR 122 (United States Court of Appeals, 9th Circuit (2014) Note: This is an unpublished decision.

8. The Court concluded that the IEP for a student with autism was both procedurally and substantively appropriate. In addition to other issues, the parents alleged that the school failed to adequately report the student's progress toward the annual goals and objectives listed in his IEPs. They contend the lack of progress reporting deprived them of meaningful participation in Drew's education.

There was evidence that the IEPs contained little or no progress reporting or measurement data and where progress was reported, it was "lacking in detail" or limited to "conclusory statements". However, the evidence also showed the parents were aware of their student's progress and were active participants in his education. There was "constant communication" between the parents and the student's special education teacher both through face-to-face meetings and a "back-and-forth notebook". The Court held that the ALJ did not err in concluding the gaps in the IEP progress reporting did not inhibit the parents from meaningful participation.

The Court did raise a concern by stating:

> In reaching this conclusion, we do not downplay the importance of regular and diligent progress reporting on IEPs. In a system built on the continuous revision of individualized plans meant to address disabled students' unique needs, data on what is or is not working for a student is crucial…. Thus, while we do not endorse the

> District's reporting in this case, without evidence that there was an impact on [the student's] education, we cannot say he was effectively denied a FAPE.

Endrew F. v. Douglas County School District 66 IDELR 31(United States Court of Appeals, 10th Circuit (2015)).

C. Substantive Issues

1. The parents of a 17 year old student with a specific learning disability challenged his IEPs which they alleged were not based on his individual needs. The Court concluded that the IEPs' reading goals were inappropriate given the student's assessment data.

The IDEA requires IEPs that include a reasonably accurate assessment of students and meaningful goals based on the student's individual needs. The evidence here indicated that the IEP goal for reading was not designed for this student but was the "state standard for ninth grade students" regardless of whether it fit his particular needs. The teachers testified that "they just inserted the standard 9th grade goal" even though his reading skills were assessed to be on a first grade level. The Court noted the school's apparent use of boilerplate IEPs, with goals far above the student's reading level, indicated that the reading goals of the student's IEPs did not provide him with any educational benefits beyond those he would have received if he never had the IEPs. It appeared the student was treated as any other disabled student during the creation of his IEPs, and was held to the same standards that any student, with or without a disability, would have been.

The Court found that such a practice flies in the face of the purpose and goals of the IDEA, which require the district to develop an individualized program with measurable goals. The point of requiring an IEP is to have the program meet the child's unique needs, not to assume that all children in special education are capable of meeting state goals for that grade level.

In addition, the Court found that the transition services were inappropriate. The IDEA requires IEPs to include "appropriate measurable post-secondary goals based on an age appropriate transition assessment" and to describe the transition services to be provided. In this case, the vague language used to describe the student's postsecondary goal -- "student will be prepared to participate in post-secondary education" -- did not match his diploma track. The student was placed on an alternate diploma track which is designed to prepare students with disabilities for employment upon exiting high school. The Court stated that this

was another illustration of the school's use of stock language in the planning and implementation of this student's IEP. As a result, FAPE was denied. Jefferson County Board of Education v. Lolita S. 64 IDELR 34 (United States Court of Appeals, 11th Circuit (2014)). Note: This is an unpublished decision.

2. A student with drug abuse problems and suicidal behaviors was found eligible for IEP services due to her ADHD. After placement in a hospital for a suicide risk assessment and an in-patient substance abuse rehabilitation facility, the parents presented the school with a discharge summary which recommended an alternative school setting and attendance in Alcoholics Anonymous/Narcotic Anonymous meetings.
The parents rejected the IEP developed for the student calling for placement in a special education community school program with full-time emotional support in school. The parent placed the student in a private college preparatory therapeutic boarding school where about half the students have alcohol and substance dependency issues. The parents then filed for due process requesting reimbursement for that placement.
The Court, in affirming the hearing officer, found that the IEP was appropriate and reimbursement was not warranted. The IEP properly identified the student's needs, set goals in multiple areas and provided full-time emotional support services. The staff were specially trained to be aware of and to intervene with drug and alcohol problems and the underlying emotional issues. The program has a school wide behavior plan and individual student behavior support plans. In so concluding, the Court stated that "a school district cannot be held responsible for treating a student's longstanding drug addiction, familial problems, or delinquent behavior". E.K. v. Warwick School District 62 IDELR 289 (United States District Court, Eastern District, Pennsylvania (2014)).

3. The Court held that the student's IEP did not provide the student with a FAPE since it did not properly address the student's visual impairment. Although the school had a report that the student was visually impaired, the report was "buried in some files" and not used in preparing the student's IEP. The evidence showed that the student's classroom teachers were oblivious to the nature of his visual impairment.
The evaluation conducted by the vision teacher focused primarily on evaluating the impact of the student's impairment on his mobility and did not address the impact on his learning. The fact that the student's teachers exhibited no understanding of the impact of the student's disability is a "damning failure" on the part of the school district leading to an inappropriate IEP. Caldwell

Independent School District v. Joe P. 62 IDELR 192 (United States Court of Appeals, 5th Circuit (2014). Note: This is an unpublished decision.

4. The IEP for a student with autism called for the student to be placed in a 6:1:1 (6 students, one teacher, one aide) classroom that included occupational, speech, and language therapy, as well as a behavioral management paraprofessional and supports. The proposed classroom used the TEACCH methodology. The parents wanted their student in a placement that utilized the Applied Behavior Analysis (ABA) method for teaching students with autism. A due process hearing was initiated.
The Court upheld the IEP as providing FAPE noting that the school district's witness testified that TEACCH was an appropriate instructional method for the student. Specifically, the Court stated, "We are required to give particular deference to state educational authorities on the issue of educational methodology, see Board of Education v. Rowley, (1982), and on this record it cannot be said that [the student] could only progress in an ABA program." A.S. v. New York City 63 IDELR 246 (United States Court of Appeals, 2nd Circuit (2014)). Note: This is an unpublished decision. See also R.B. v. New York City 64 IDELR 126 (United States Court of Appeals, 2nd Circuit (2014). Note" This an unpublished decision.

5. The parents of a student with autism were reimbursed for their unilateral placement in a private special education school by a hearing officer. The school used a teaching methodology known as DIR/Floortime. [Note: DIR/Floortime is a form of play therapy that uses interactions and relationships to reach children with developmental delays and autism. Floortime is based on the theory that autism is caused by problems with brain processing that affect a child's relationships and senses, among other things. It strongly emphasizes social and emotional development. Autism Web: A Parent's Guide to Autism Spectrum Disorders]
The school district developed an IEP for the following school year which called for placement in a special class for students with autism in a public school that offered year round services. Many of the goals in the IEP came from a report created by the private special education school. However, the IEP does not require that DIR/Floortime be used to implement the goals.
The hearing officer, state review officer and District Court held that the IEP was appropriate. The Court of Appeals vacated the decision and remanded the matter for further consideration of whether the IEP was appropriate without adopting the methodology from the private school.
The Court noted that:

> We have held that, because of their specialized knowledge and experience, state administrators are generally superior to federal courts at resolving "dispute[s] over an appropriate educational methodology.…That deference is warranted, however, only if the state administrators weigh the evidence about proper teaching methodologies and explain their conclusions.

In this case, neither the hearing officer nor state review officer determined whether the "DIR/Floortime" methodology was necessary to implement the goals in the IEP even though it was listed as an issue in the due process complaint. The general conclusion that the IEP was "sufficient to address the student's demonstrated needs," was no replacement for a direct evaluation of the evidence on teaching methodology. The Court concluded that a "failure to consider any of the evidence regarding ... methodology ... is precisely the type of determination to which courts need not defer." E.H. v. New York City Department of Education 65 IDELR 162 (United States Court of Appeals, 2nd Circuit (2015)) Note: This is an unpublished decision.

6. A high school student was “twice exceptional” being both academically gifted and IEP eligible. The student, who was diagnosed with Asperger’s Syndrome, obsessive compulsive disorder, mood disorder, adjustment disorder and Tourette’s syndrome, had a 1:1 paraprofessional and attended general education classes (including advanced placement classes) for the majority of her day. Her GPA was above 4.0 due to her advanced placement courses.

   The student was raped over Christmas vacation of her sophomore year while the family was on vacation. The parents and school agreed to postpone the annual review of her IEP scheduled for January and instead developed an interim IEP with several accommodations to ease her transition back into school after the rape. That spring the student had experienced some inappropriate social and physical interactions with other students. In addition, although she auditioned for the school choir, she was not selected. The parent requested an IEP Team meeting where she spent a good portion of the time advocating for her daughter to be put on the choir. When the Team refused the request, the student was withdrawn from school and placed in a private special education school out of state. A due process hearing was requested.

The Court, in affirming the ALJ, held that the IEP provided the student with a FAPE. First, the Court rejected the argument that FAPE was denied since the annual IEP review did not take place since the parent agreed to the course of action. Second, the Court found that each incident of bullying that was reported was promptly investigated and resolved. Lastly, the Court noted the student was making academic progress and had a better attendance record. The IEP Team worked closely with the student's medical/mental health team and implemented their recommendations for the student. Sneitzer v. Iowa Department of Education 66 IDELR 1 (United States Court of Appeals, 8th Circuit (2015))

IV. Related Services/Assistive Technology

A. The United States Supreme Court Decision – Irving Independent School District v. Tatro, 104 S. Ct. 3371, IDELR 555:511 (1984).

1. The United States Supreme Court established a three-prong test for determining whether a particular service is considered a related service under the IDEA. To be entitled to a related service:

a) A child must have a disability so as to require special education under the IDEA;

b) The service must be necessary to aid a child with a disability to benefit from special education; and

c) The service must be able to be performed by a non-physician.

B. The parents of an 8 year old student with autism rejected the IEP developed for their student which called for services to be provided in the "total school environment" and made a unilateral placement at a private special education school. They sought reimbursement by requesting a due process hearing.
The Court held that the provision of speech services through an "embedded model" (direct speech therapy provided in the classroom with peers present) as opposed to a "pull out" model was appropriate. In addition, although a graduate clinician provided some of the services and authored the progress notes, the clinician was being supervised by a speech language pathologist and therefore her role of clinician did not impact the appropriateness of the services. Although the student may have made more progress through one-on-one therapy, the evidence supported the conclusion that the student made significant progress through the embedded model of services. E.L. v. Chapel Hill-Carrboro Board of

Education 773 F.3d 509, 64 IDELR 192 (United States Court of Appeals, 4th Circuit (2014)).

C. The parents of an 8 year old student with autism initiated a due process hearing alleging that FAPE was denied in particular regarding the students communication needs. The hearing officer agreed and ordered compensatory education.
The parents provided testimony that they used an iPad (with the Proloquo2Go application) to communicate with the student successfully at home which reduced her problematic behaviors. The school testified that they did not find that to be the case in school and felt that when she used the iPad it did not improve her communication skills. The school stopped using the iPad application and started using the Picture Exchange Communication System (PECS). The evidence showed that there had been "inconsistent and limited progress" under the student's IEP communication goals.
The Court held that the student was denied a FAPE. The Court stated "Despite widespread agreement that [the student] used behaviors to communicate when other avenues are unavailable, and that [the student] had more success with assistive technology outside of school, the District failed to take affirmative measures to determine why [the student] did not exhibit those successes at school. '[I]t is the responsibility of the child's teachers, therapists, and administrators -- and of the multi-disciplinary team that annually evaluates the student's progress -- to ascertain the child's educational needs, respond to deficiencies, and place him or her accordingly.'" North Hills School District v. M.B. 65 IDELR 150 (Pennsylvania Commonwealth Court (2015)).

D. OSEP issued a letter to the field raising concerns that based on reports it received a growing number of children with an autism spectrum disorder (ASD) may not be receiving needed speech and language services. They also raised a concern that speech-language pathologists and other appropriate professionals may not be included or their input obtained in evaluation, eligibility and IEP/IFSP meetings. OSEP stated "Some IDEA programs may be including applied behavior analysis (ABA) therapists exclusively without including, or considering input from, speech language pathologists and other professionals who provide different types of specific therapies that may be appropriate for children with ASD when identifying IDEA services for children with ASD." The letter reminds schools that "ABA therapy is just one methodology used" to address the needs of children with ASD and that Team decisions regarding services must be based on the unique needs of each individual child with a disability. Dear Colleague Letter 66 IDELR 21 (United States Department of Education, Office of Special Education Programs (OSEP) (2015)).

E. A student with "profound physical and intellectual disabilities" also has a

chronic epileptic seizure disorder. His doctor prescribed drug treatment (Diastat) which needs to be administered rectally "without delay" if his seizure lasts for more than five minutes to avoid a life threatening condition.

The student's health plan provided for the administration of the medication if the student has a seizure lasting more than five minutes at school. Although the student never had a seizure lasting more than five minutes at school or on the school bus, his seizures increased in frequency and duration.

The school adopted a bus policy which stated that if the student had a seizure on the special education school bus the driver would call 911 and proceed to either the school or the student's home whichever was closer. The policy allowed for an exception if the student's doctor provided sufficient information. In this case, the parent refused to sign a release to allow the school to speak with the student's doctors. All of the school's questions were to go through the parent and the parent would let the school know what the doctor stated.

The Court found that the student was denied a FAPE since the IEP did not include a trained bus aide to accompany the student. However, the aide need not administer the medication unless the school bus could not reach either the student's home or school within five minutes after the seizure begins without additional information from the student's doctors. Oconee County School District v. A.B. 65 IDELR 297 (United States District Court, Middle District, Georgia (2015)).

V. Placement/Least Restrictive Environment

A. The Court concluded that the IEP for a 12 year old student with specific learning disabilities failed to provide the student a FAPE in the least restrictive environment. The IEP called for the student to spend five out of six and half hours each day in the regular classroom.

The IDEA requires the IEP to explain the extent, if any, that the student will not be educated in an environment with peers who are non-disabled after the team has considered the student's needs and the provision of supplementary aids and services. This student's IEP stated that a "regular classroom environment with supplementary aids and services….would not meet [the student's] need for specially designed instruction at this time". The Court affirmed the hearing officer's finding that this vague statement regarding placement did not include the reasons for the student's exclusion from the regular education classroom. Since the Court found the school failed to meet the IDEA standard to identify reasons why the student would be excluded part-time from the regular classroom environment, FAPE was denied. Hannah L. v. Downington Area School District 63 IDELR 254 (United States District Court, Eastern District, Pennsylvania (2014))

B. The Court held that the IEP developed for a student with autism was both procedurally and substantively appropriate. The parents alleged that they were denied meaningful opportunity to participate in the selection of the school their son would attend. Although the Court noted that this issue was waived since it was not included in their due process hearing complaint, even if it had been included it lacked merit. Parents are "guaranteed only the opportunity to participate in the decision about a child's 'educational placement,' … which 'refers to the general educational program -- such as the classes, individualized attention and additional services a child will receive -- rather than the 'bricks and mortar' of the specific school' " citing the T.Y. v. New York City (2009).

In addition, the Court upheld a change in placement to a classroom with six students, one teacher, one classroom paraprofessional and a full time "transitional paraprofessional" to support the student's move from a private to a public school. The parents contended that this program was too supportive since it would be a "crutch that vitiates their son's right to be educated in the least restrictive environment". The Court observed that "the least restrictive environment applies to the type of classroom setting, not the level of additional support a student receives within a placement". R. B. v. New York City Department of Education 65 IDELR 62 (United States Court of Appeals, 2nd Circuit (2015). Note: This is an unpublished decision.

C. The Court held that the least restrictive environment provisions of the IDEA apply to extended school year placements just as it does to school year placements. Therefore, the IEP Team in determining the extended school year program for the student was required to consider a continuum of alternative placements for the student. The Court overturned the District Court's decision that the school met its obligations to the student with autism by developing an extended school year IEP in a self-contained special education classroom. T.M. v. Cornwall Central School District 752 F.3d 145, 63 IDELR 31 (United States Court of Appeals, 2nd Circuit (2014)).

VI. Behavior and Discipline

A. The parents of a student with autism challenged the appropriateness of their student's IEPs on several grounds. Regarding behavior, the parents alleged the IEPs were legally deficient since they failed to adequately address his behavior since the school did not conduct a functional behavioral assessment or implement a behavior intervention plan. The Court upheld the IEPs holding that the alleged failure to conduct a functional behavioral assessment or develop a behavior intervention plan did not violate the IDEA. The IDEA only requires a school district to conduct an FBA or to implement a behavior plan if there is a disciplinary

change of placement which was not the case here. Absent a disciplinary change of placement, the IDEA requires the IEP Team to "consider the use of positive behavioral interventions and supports and other strategies" if behavior is impeding the student's learning or that of others. The evidence supported the conclusion that the Team considered the student's behavioral issues with interventions and was in the process of reassessing his behavior interventions when the student was withdrawn from school. Endrew F. v. Douglas County School District 66 IDELR 31 (United States Court of Appeals, 10th Circuit (2015)).

B. The parents of a fifth grade student who is emotionally disturbed challenged the appropriateness of her IEP which included a behavior intervention plan. The evidence showed that at the end of her fourth grade year and into her fifth grade year, she would have outbursts in the classroom that would require the teacher to redirect her, take her out of the classroom, and, if she did not de-escalate, the counselor or other staff would have to move her to a cool-down area and counsel her on coping strategies and de-escalation.

By the end of her fifth grade year, the student was self-regulating when she was shutting down and would self-remove from the classroom to the cool-down area. The number of outbursts in class decreased significantly, and she was able to come back to the classroom on her own initiative. The evidence demonstrated that the school district reviewed the BIP with the student's teachers, trained her teachers on the BIP, and implemented the BIP. The student showed progress under the BIP in that she was learning to use self-control. Therefore, the Court found that the IEP and BIP were appropriate. C.P. v. Krum Independent School District 64 IDELR 78 (United States District Court, Eastern District, Texas (2014)).

VII. Harassment/Bullying Issues

A. Alaska Law (AS 14.33.250)

"harassment, intimidation, or bullying" means an intentional written, oral, or physical act, when the act is undertaken with the intent of threatening, intimidating, harassing, or frightening the student, and
(A) physically harms the student or damages the student's property;
(B) has the effect of substantially interfering with the student's education;
(C) is so severe, persistent, or pervasive that it creates an intimidating or threatening educational environment; or
(D) has the effect of substantially disrupting the orderly operation of the school.

B. The United States Department of Education's Office of Special Education and Rehabilitative Services (OSERS) issued a letter providing an

overview of a school district's responsibilities under the IDEA to address bullying of students with disabilities. Although there is no federal law addressing bullying , the Department defines bullying as:

> Bullying is characterized by aggression used within a relationship where the aggressor(s) has more real or perceived power than the target, and the aggression is repeated, or has the potential to be repeated, over time. Bullying can involve overt physical behavior or verbal, emotional, or social behaviors (e.g., excluding someone from social activities, making threats, withdrawing attention, destroying someone's reputation) and can range from blatant aggression to far more subtle and covert behaviors. Cyberbullying, or bullying through electronic technology (e.g , cell phones, computers, online/social media), can include offensive text messages or e-mails, rumors or embarrassing photos posted on social networking sites, or fake online profiles.

The Department emphasized that bullying of a student with a disability that results in the student not receiving meaningful educational benefit constitutes a denial of a free appropriate public education (FAPE) under the IDEA whether or not the bullying is related to the student's disability. The denial of FAPE must be remedied.

The school should, as part of its appropriate response to the bullying, convene the IEP Team to determine whether, as a result of the effects of the bullying, the student's needs have changed such that the IEP is no longer designed to provide meaningful educational benefit. If the IEP is no longer designed to provide a meaningful educational benefit to the student, the IEP Team must then determine to what extent additional or different special education or related services are needed to address the student's individual needs; and revise the IEP accordingly. The IDEA placement team (usually the same as the IEP Team) should exercise caution when considering a change in the placement or the location of services provided to the student with a disability who was the target of the bullying behavior and should keep the student in the original placement unless the student can no longer receive FAPE in the current LRE placement.

If the student who engaged in the bullying behavior is a student with a disability, the IEP Team should review the student's IEP to determine if additional supports and services are needed to address the inappropriate behavior. In addition, the IEP Team and other school personnel should consider examining the environment in which the bullying occurred to determine if changes to the environment are warranted. Dear Colleague Letter 61 IDELR 263 (United States Department of Education, Office of Special Education and Rehabilitative Services and the Office of Special Education Programs (2013)).

C. The Office for Civil Rights (OCR) issued a guidance document regarding a school district's responsibility to address the bullying of a student who is deemed disabled under Section 504.

The bullying of a student on any basis (whether disability related or not) who is receiving services and/or accommodations under a 504 plan may result in a denial of FAPE that must be remedied. A school's compliance with state law and/or local school policy is not sufficient to meet the school's responsibility under Section 504.

Under Section 504, as part of the school's response to bullying, the school should convene the Section 504 Team to determine whether, as a result of the effects of bullying, the student's needs have changed such that the student is no longer receiving a FAPE. The effects of bullying could include adverse changes in the student's academic performance or behavior.

If the Team determines that the student's needs have changed, the Team must determine the extent to which additional or different services are needed. If the Team is considering a change of placement, the Team must ensure that the Section 504 least restrictive environment requirements are met. The Team must safeguard against "putting the onus on the student with the disability to avoid or handle the bullying". Dear Colleague Letter: Responding to Bullying of Students With Disabilities (United States Department of Education, Office for Civil Rights (October 21, 2014).

D. The District Court reversed the hearing officer's and state review officer's decisions and concluded the student was denied a FAPE due to being the victim of bullying.

The Court stated that "a disabled student is deprived of a FAPE when school personnel are deliberately indifferent to or fail to take reasonable steps to prevent bullying that substantially restricts" the educational opportunities of the student with disabilities. The conduct does not need to be outrageous in order to be considered a deprivation of rights of a disabled student. It must, however, be
sufficiently severe, persistent, or pervasive that it creates a hostile environment. Where there is a "substantial probability that bullying will severely restrict a disabled student's educational opportunities, as a matter of law an anti-bullying program is required to be included in the IEP".

The Court concluded in this case the fact that the IEP Team refused to take bullying into account when drafting the student's IEP and behavior intervention plan denied a FAPE. When the student's parents sought to raise the bullying problem as it related to her educational needs and opportunities during the IEP Team meeting they were told that it was not an appropriate topic for the meeting. The IEP team's refusal to allow the parents to raise their legitimate concerns about bullying as it related to her FAPE deprived them of meaningful participation in the development of her IEP.

The Court also reviewed the goals and services in the IEP and BIP and observed that "a lay parent would not have understood them as reasonably calculated to provide a FAPE" in light of the bullying that occurred. The law requires that "the substance of the IEP must be intellectually accessible to parents" so that they could make an informed decision as to its appropriateness.

Lastly, the Court found that the student's learning opportunities were restricted by bullying which was an additional ground for finding that FAPE was denied. The student complained almost daily, withdrew emotionally, started bringing dolls to school for comfort, and was late or absent a for 46 days during the school year because she didn't want to go to school. Although she improved academically, the Court observed that academic growth is not an "all or nothing proposition".

The Court ordered that the parents be reimbursed for their unilateral private placement as a result. T.K. v. New York City 32 F.Supp. 3d 405, 63 IDELR 256 (United States District Court, Eastern District, New York (2014)).

E. The parents of a student with a specific learning disability, a post traumatic stress disorder and a generalized anxiety disorder initiated a due process hearing alleging that their student was denied a FAPE due to bullying and an inappropriate reading program. The Court, in affirming the hearing officer, held that the student was not denied a FAPE as a result of being bullied. In reaching its conclusion, the Court noted that the school took steps to eliminate a culture of harassment and bullying. Although the school could have implemented additional measures, it was not indifferent and appeared willing to take further actions. The IEP team drafted an IEP that "contained significant changes to address the social/emotional needs of the student." The IEP also provided a Behavioral Intervention Plan providing for coping skills, social skills, and self-regulating breaks. N.M. v. Central Bucks School District 62 IDELR 237 (United States District Court, Eastern District, Pennsylvania (2014)).

F. The United States Department of Education issued a guidance letter which clarifies that a school is allowed to share some information regarding the outcome of the school's investigation of a harassment complaint with the parent of the student who had been subjected to harassment without violating FERPA. The Department stated that "the Department has long viewed FERPA as permitting a school to disclose to the parent of a harassed student (or to the harassed student if 18 or older or in attendance at a post-secondary institution) information about the sanction imposed upon a student who was found to have engaged in harassment when that sanction directly relates to the harassed student."

The letter shares examples of disciplinary sanctions which directly relate to a harassed student which include, but are not limited to: "an order that the harasser stay away from the harassed student" and an order "that the

harasser is prohibited from attending school for a period of time, or transferred to other classes." Letter to Soukup 115 LRP 18668 (United States Department of Education, Family Policy Compliance Office (2015))

G. The parents of a student with Tourette Syndrome filed a lawsuit against the school district, claiming it violated the ADA and Section 504. They claimed the school was deliberately indifferent to peer-to-peer harassment on the basis of the student's disability and that the school intentionally discriminated against the student.

The parents allege several specific examples of bullying that occurred during the student's 5th, 6th, and 7th grade years and other more general instances that spanned the entire period from K through 7th grade. The general instances mostly involved name-calling. Students allegedly called the student with a disability "retard, chickenhead, twitch, tic-toc, and spaz." The student stated that he frequently reported the name-calling, but was told to stop being a tattle-tale. One teacher stated that she sent some students to the principal's office for name-calling on one occasion, but that they were never punished. In a Section 504 or ADA peer-to-peer harassment case, a student must demonstrate a genuine issue of material fact as to the following: (1) he was an individual with a disability, (2) he was harassed based on his disability, (3) the harassment was sufficiently severe or pervasive that it altered the condition of his education and created an abusive educational environment, (4) the school knew about the harassment, and (5) the school was deliberately indifferent to the harassment.

The Court stated "that the deliberate indifference standard does not require schools to "purge" themselves of harassment and that the standard grants a high level of deference to a school's judgment." In this case, the Court held that the school was not deliberately indifferent. The principal's testimony supported the fact that she investigated the reported behaviors and the rationale for disciplining some students and not others. In addition, the school district provided, to students and teachers, training to counter bullying. That training was conducted using "two nationally-recognized programs designed to teach kindness and compassion to students." The Court also held that there was insufficient evidence that the student was ever removed from class due to intentional discrimination based on his disability. Nevills v. Mart Independent School District 65 IDELR 164 (United States Court of Appeals, 5th Circuit (2015)). Note: This is an unpublished decision.

VIII. Liability Issues

A. A former high school student with autism is now 20 years old and attending college. He signed a Delegation of Rights, as provided under state law, giving his parents the authority to act on his behalf in making

educational decisions when he became an adult student.
The student and parents alleged that when in high school the student was not provided the accommodations stated in his IEP and school personnel ignored the parents phone calls and attempts to schedule meetings and ignored eight requests to view their student's educational records. As a result they alleged the student started failing his courses, became anxious, and suffered headaches and nausea which caused him to miss school. The parents hired a private tutor for the student as a result.
A due process hearing was requested. The hearing officer dismissed the request due to the failure of the parents to comply with pre-hearing requirements.
The parents then sued the former school district, teachers and administrators, both in their official and personal capacity, under Section 1983, the IDEA, Section 504, the ADA and the 14th Amendment. The District Court dismissed the lawsuit holding that the parents lacked legal standing since the claims were based on the IDEA and all IDEA rights reverted to the student when he turned 18.
The Court of Appeals reversed the dismissal holding that the Delegation of Rights provided them legal authority and the allegations included claims that their parental rights were violated regarding participation in meetings and access to their student's educational records. In addition, they were seeking reimbursement for the private tutor they had paid for. The allegations were also sufficient to support a retaliation claim under Section 504 and the ADA.
The Court affirmed the dismissal of Section 504 and ADA claims against staff in their personal capacity. However the Court held the IDEA claims against school personnel in their personal capacity should not have been dismissed. The Court stated "We draw the line, however, at the IDEA claims, which should have gone forward at this stage. We have not found a decision from any circuit holding that individual school employees cannot be personally liable for violating IDEA." The case was remanded back to the District Court for further proceedings. Stanek v. St. Charles Community Unit School District #303 115 LRP 15369 (United States Court of Appeals, 7th Circuit (2015)).

B. The Director of Special Education initiated contact with social services reporting that, based on teachers' statements and statements from the student, she had reason to believe that the father of a student with an intellectual disability engaged in inappropriate physical behavior with the student. After investigating the report, social services found that the abuse allegations in the report were unsubstantiated.
The parents then initiated a Section 1983 cause of action against school staff alleging retaliation based on the 1st Amendment in response to their advocacy and deprivation of substantive due process. The claims against the staff, except for the Director of Special Education, were dismissed.
The Court of Appeals, affirming the District Court, held that the Director

was not entitled to qualified immunity. The Court found that the parents' allegations established that the Director was motivated at least in part by the father's advocacy on behalf of his student in filing the child abuse report. Even though the Director was a mandated reporter of abuse under state law, the Court stated it does not conclusively establish that she would have initiated the abuse report absent the father's strong advocacy on behalf of his daughter. The case will proceed to trial. Wenk v. O'Reilly 783 F.3d 585, 65 IDELR 121 (United States Court of Appeals, 6th Circuit (2015)). Request for appeal to the United States Supreme Court pending.

C. The parent of a student with autism sued the special education teacher and the school district under Section 1983 for alleged violations of her student's Constitutional rights under the 4th and 14th Amendments.
The use of an unlocked "safe room" was in the IEP's behavior component to be used to calm the student down if overly stimulated or aggressive. The parents alleged the teacher used a locked dark "safe room" to punish the student. The parent alleged that the student was kept in the room for an undetermined amount of time and often took his clothes off, urinated and defecated in the room. The parent also claimed that the teacher kept the student in the safe room until he defecated and then made him clean up his own feces as a form of punishment.
The Court of Appeals, in reversing the District Court, held that the special education teacher was entitled to qualified immunity under both the 4th and 14th Amendment claims. The Court found "at the time she acted, it would not have been clear to a reasonable official that placing [the student] in the safe room, as part of his aversive and behavioral intervention plan, was an unconstitutional seizure" and "it would not have been clear to a reasonable official that having [the student] assist in cleaning up after he defecated in the safe room violated [the student's] substantive due process rights". The Court remanded the matter for further proceedings on the remaining claims.
Payne v. Peninsula School District 115 LRP 35065 (United States Court of Appeals, 9th Circuit (2015). Note: This is an unpublished decision.

D. The parent of a student with a speech and language disability disagreed with the school district's evaluation which concluded that his student also fell on the autism spectrum. He asked that the evaluation be removed from his student's educational records. The school refused maintaining that the evaluation was proper.
Subsequent email communications with staff alleged that his student was not receiving the services specified in her IEP and that staff was acting illegally and unethically by falsifying records.
Ultimately, the school district's attorney sent an email to the parent instructing him to direct all future communications with the school through the attorney since staff felt "extremely anxious and threatened" by the parent. The attorney suggested that a meeting be set up to discuss the

parent's concerns but the parent unilaterally canceled the meeting.
The school then filed for a Temporary Restraining Order on three occasions. The Superior Court denied the school's request.
The parent then filed a lawsuit against the school district and staff alleging that he had been subject to retaliation in violation of Section 504 and the ADA for advocating for his student. The lawsuit was seeking monetary damages for retaliation.
The Court refused to grant the school district's Motion for Summary Judgment holding that the alleged disputed facts presented triable issues precluding summary judgment. Lee v. Natomas Unified School District 115 LRP 8673 (United States District Court, Eastern District, California (2015)).

IX. Procedural Safeguard/Due Process Issues

A. Attorney Fees

1. The parents initiated a lawsuit for attorneys' fees. The Court found that the parents prevailed in the due process hearing when the Court found that the school district's evaluation was not appropriate and ordered the district to pay for an independent educational evaluation. In a companion decision, the Court also held that the student was not eligible for special education. Although the parents were prevailing parties and brought their attorneys' fees claim in a timely manner, the Court denied reimbursement. The Court held that since the parents were not a "parent of a child with a disability" under the IDEA (a child with a disability who is in need of special education), the Court was bound by the clear language of the IDEA limiting the award of attorneys' fees to a parent of a child with a disability. D.A. v. Meridian Joint School District No. 2 65 IDELR 253 (United States Court of Appeals, 9th Circuit (2015).

B. Statute of Limitations/Scope of Relief

1. The Court addressed the legal question of whether the IDEA's two year statute of limitations (unless a State has enacted a different period of time) limited the time period for filing a due process hearing and/or limited the period of time in which a remedy can be awarded.
In the first Court of Appeals decision on the issue, the Court concluded that the IDEA's statutory wording is ambiguous. After analyzing the rules of statutory interpretation and legislative intent, the Court held that the IDEA's statute of limitations only applies to the filing of the due process hearing complaint, that is, it must filed within two years after the parents "knew or should have known"

about the alleged violation (Note: The IDEA contains two exceptions: specific misrepresentations by the school or the withholding of statutorily mandated information). The two year statute of limitations does "not act as a cap on a child's remedy for timely filed claims that happen to date back more than two years before the complaint is filed." Therefore, compensatory education can be awarded to whatever extent is necessary to make up for the child's denial of FAPE and is not limited to the two year period. G.L. v. Ligonier Valley School District 115 LRP 45166 (United States Court of Appeals, 3rd Circuit (2015)).

C. Resolution Meetings

1. The parents requested a due process hearing on behalf of their student. The parties agreed to convene a resolution meeting. In addition the parents, the Superintendent, the Director of Special Education and other school staff attended the meeting.
At the resolution meeting, the school agreed to start the special education evaluation process and in response to the parents' request for an independent educational evaluation, the Director indicated that the school would do so if approved by the School Board.
The parents filed a second due process hearing alleging that the school violated the IDEA's requirement that a resolution meeting include "a representative of the public agency who has decision making authority on behalf of that agency". (see 34 CFR 300.510(a)(1)(i)). At the hearing the Superintendent testified that he was there to listen and that the "[f]inal authority is with the Board as far as whether or not it could be resolved[,]".
The Court agreed with the hearing officer that the school did not comply with the IDEA's resolution meeting requirements. The Court stated that the Superintendent or some other administrator satisfies the statutory requirement only if he or she, in fact, has the authority -- by express delegation or otherwise -- to make the decision about what the school will or will not do to resolve the issues presented in the IDEA complaint. The IDEA statute clearly contemplates the resolution session as just that -- a meeting at which the school and parents can reach a resolution because those with the authority to decide are participants.
However, the Court disagreed with the hearing officer's conclusion that this procedural violation resulted in a denial of FAPE. The Court concluded that in the absence of evidence of what would have resulted from a properly-constituted resolution meeting, there is no basis for concluding that this procedural violation caused a deprivation of educational benefits, impeded the student's right to a FAPE, or significantly impeded his parents' opportunity to

participate in the decision-making process. J.Y. v. Dothan City Board of Education 63 IDELR 33 (United States District Court, Middle District, Alabama (2014)).

D. State Administrative Complaints

1. It is not consistent with the IDEA for the SEA to assign the burden of proof to either party when handling a state administrative complaint. It is solely the SEA's duty to investigate the complaint, gather evidence and make a determination as to whether a public agency violated the IDEA. It is not the burden of either party to produce evidence to persuade the SEA to make a determination one way or another.
It is consistent with the IDEA for a state to use the "preponderance of evidence" standard in making the independent determination in a state complaint. Letter to Reilly (United States Department of Education, Office of Special Education Programs (2014)).

2. A school district and a county office sued the state department of education alleging that the department violated IDEA requirements when handling state administrative complaints. In one case, the state department of education reconsidered its decision twice eventually finding merit to the parent's complaint. The school district also alleged that the department imposed a burden of proof on the school district when it should have been imposed on the parents.
The Court held that school districts "lack an implied right of action in the context of complaint resolution proceedings". Therefore, the case was dismissed.
The Court commented that whether parents have an implied right of action to sue state education agencies for violating the IDEA in complaint resolution proceedings was not an issue before the Court and therefore the Court was silent regarding a parent's right to bring such an action. Fairfield-Suisun Unified School District v. California Department of Education 780 F.3d 968, 65 IDELR 61 (United States Court of Appeals, 9th Circuit (2015).

3. The parents filed an administrative complaint with the state education agency alleging that the school district failed to comply with the IDEA procedures after they requested an independent educational evaluation at pubic expense. The school district requested a due process hearing two weeks later to show that its evaluation was appropriate.
The state education agency closed its investigation since the issue was now before an administrative law judge. The IDEA requires that a state set aside the investigation of any part of a state

complaint that is being addressed in a due process hearing. (see 34 CFR 300.152(c)). The parents then sued the state education agency.

The Court held that the IDEA statutory provisions regarding required state policies and procedures and procedural safeguards (20 U.S.C. Sections 1412(a) and 1415(a)) do not provide the parents with an express private right of action. Therefore, the Court upheld the dismissal of the state education agency from the lawsuit.

It should be noted that in a footnote the Court declined to address whether a private right of action could be implied since the parents' brief did not discuss the factor whether Congress intended to create a private right of action. M.M. v. Lafayette Board of Education 64 IDELR 31, 767 F.3d 842 (United States Court of Appeals, 9th Circuit (2014)). (Amended Opinion)

4. The U.S. Office of Special Education and Rehabilitative Services (OSERS) issued a letter raising concern over the practice that some school districts have engaged in by requesting a due process hearing after the parents have filed a state administrative complaint. The IDEA requires that if a complaint is received that is also the subject of a due process hearing, the state must set aside any part of the state complaint that is being addressed in the due process hearing until the hearing officer issues a final decision or dismisses the due process complaint. (See 34 CFR 300.152(c)(1))

OSERS stated that the purpose of such practice was "ostensibly to delay the state complaint process and force parents to participate in, or ignore at considerable risk, due process complaints and hearings. Increased costs and a potentially more adversarial and lengthy dispute resolution process are not in the best interest of children with disabilities and their families."

OSERS "strongly encourage" school districts to respect the parents' choice of dispute resolution forums by using the state complaint process rather than a due process hearing. Dear Colleague Letter 65 IDELR 151 (United States Department of Education, Office of Special Education and Rehabilitative Services (2015))

5. The U.S. Office of Special Education Programs clarified that if a State Education Agency (SEA) has determined that corrective actions are necessary as a result of an administrative complaint investigation and a due process hearing is subsequently filed on the same issues, the SEA cannot permit the school district to delay implementation of the corrective actions. Under its IDEA general supervisory responsibility the SEA would be obligated to ensure that the corrective actions are completed as soon as possible within

the timeframe specified in the SEA's written decision, and not later than one year from the SEA's identification of the noncompliance. OSEP also addressed the types of corrective actions the SEA may order to remedy a state complaint finding that a public agency has failed to provide appropriate services to a student. OSEP stated that SEAs have broad flexibility to determine the appropriate remedy or corrective action necessary to resolve a complaint and the nature of corrective actions will differ based on the specifics of the particular complaint. One option is that an SEA may order child-specific services that must be provided in order to ensure that a child with a disability receives FAPE. Another option is for the SEA to order the IEP Team to be reconvened to develop a program that ensures the provision of FAPE for that child or order compensatory services. OSEP cautioned:

> However, because the IDEA contemplates that the IEP Team, which includes the child's parent, is best equipped to make informed decisions regarding the specific special education and related services necessary to provide FAPE to the child, an SEA should carefully consider whether ordering the provision of services not previously in the IEP is appropriate and necessary to ensure the provision of FAPE.

Letter to Deaton 65 IDELR 241 (United States Department of Education, Office of Special Education Programs (2015)).

X. Section 504/ADA Issues

A. A 6 year old student with multiple disabilities who has cerebral palsy, spastic quadreparesis, and a seizure disorder; is non-verbal and confined to a wheelchair; and needs care and support for all aspects of daily living and education. Prior to development of the student's IEP which placed him in a special education kindergarten program, the student's parent paid to find and train a seizure alert and response service dog for the student.
Neither the student's health care plan nor his IEP includes his use of a service dog at school although he has been allowed to attend school with his service animal. The school district took the position that it was not responsible for the care or supervision of a service animal, which includes handling the service animal based on the ADA's regulations.
The parents initiated a lawsuit under Section 504 and the ADA requesting that the school permit the student to attend school accompanied by his service dog without having to provide a separate "handler" for the dog and

without having to pay for additional liability insurance and additional vaccinations. Considering the student to be the dog's "handler", the parent further asked the school to accommodate him by accompanying him and the animal outside of the school premises when the dog needed to urinate. The ADA regulations state, in relevant part, that the service animal "shall be under the control of its handler". In addition, the regulations clarify that "a public entity is not responsible for the care or supervision of a service animal". See ADA regulation at 28 C.F.R. 35.136(d) and (e).
The Court held that the school board's policy requirement that the parent maintain liability insurance for the service animal and procure vaccinations in excess of the requirements under state law is a surcharge prohibited by the ADA. Those requirements, therefore, constitute an impermissible discriminatory practice.
In addition, The Court held that the accommodation requested (taking the student and service dog outside when the dog needed to urinate) under the facts presented were reasonable accommodations under the ADA. The Court ordered the School Board to accommodate the student (through its staff) by assisting him and accompanying the service dog outside of the school premises to urinate at the infrequent occasions when needed.
The Court based its ruling on an additional ADA regulation which requires that a public entity "make reasonable modifications in policies, practices, or procedures when the modifications are necessary to avoid discrimination on the basis of disability, unless the public entity can demonstrate that making the modifications would fundamentally alter the nature of the service, program, or activity." 28 C.F.R. 35.130(b)(7).
Alboniga v. School Board of Broward County 115 LRP 5982 (United States District Court, Southern District, Florida (2015))

B. A student with cerebral palsy was on an IEP which called for one-on-one paraprofessional support. She has a service dog who assists her by increasing her mobility and assisting with some physical tasks. The student was not allowed to bring her service dog to school. The school administrators prohibited the service dog reasoning that the dog would not be able to provide any support that the paraprofessional could not provide.

The family began homeschooling their student and filed a complaint with OCR. OCR found that the school violated the ADA by not allowing the student to bring her service dog to school. The family then sued the school, the principal and the school district alleging violations of the ADA, Section 504 and state disability law.

The Court, in a 2-1 decision affirming the District Court, dismissed the lawsuit for failing to exhaust the IDEA's due process hearing system. The Court found that the "core harms" that the family raises relate to the specific purposes of the IDEA. Specifically, the Court stated:

> The exhaustion requirement applies to the [parents'] suit because the suit turns on the same questions that would have determined the outcome of IDEA procedures, had they been used to resolve the dispute. The [parents] allege in effect that [the student's] school's decision regarding whether her service animal would be permitted at school denied her a free appropriate public education. In particular, they allege explicitly that the school hindered [the student] from learning how to work independently with [the service animal], and implicitly that [the service animal's] absence hurt her sense of independence and social confidence at school. The suit depends on factual questions that the IDEA requires IEP team members and other participants in IDEA procedures to consider. This is thus the sort of dispute Congress, in enacting the IDEA, decided was best addressed at the first instance by local experts, educators, and parents.

Fry v. Napoleon Community Schools 115 LRP 25804 (United States Court of Appeals, 6th Circuit (2015)).

C. The parents of a student with Type 1 diabetes sued their former school district alleging discrimination on the basis of disability based on Section 504. The student's 504 plan incorporated the student's Doctor's order and required that three staff members be trained by the school to administer insulin to the student and to monitor and respond to alarms from his glucose monitor.

The school hired a licensed nurse to perform the necessary diabetes care for the student. The nurse resigned after a personnel dispute with her supervisor and another nurse was assigned to provide the student with care.

Due to a mix-up regarding new orders from the Doctor, the school did not follow the new order. The parents were unhappy with the school's refusal to adjust the insulin dosage at their request. The parents removed their student from public school and filed a lawsuit based on Section 504 discrimination alleging the services in the 504 plan were not fully implemented.

The Court held that there was no violation of Section 504. The Court stated "for 504 plan violations to constitute disability discrimination, they must be significant enough to effectively deny a disabled child the benefit of a public education". Even though three staff members were not trained as the 504 plan required, a nurse provided the services to the student with

the exception of one day which the Court termed a "minor violation". In addition, since the Doctor did not provide clear orders, the school did not act unreasonably in refusing to alter the recommended doses of insulin as the parent had requested. C.T.L. v. Ashland School District 743 F.3d 524, 62 IDELR 252 (United States Court of Appeals, 7th Circuit (2014)).

D. The Office for Civil Rights issued guidance reminding charter schools that Federal civil rights laws, regulations, and guidance that apply to charter schools are the same as those that apply to other public schools. For this reason, it is essential that charter school officials and staff be knowledgeable about Federal civil rights laws including Section 504. These laws extend to all operations of a charter school, including recruiting, admissions, academics, educational services and testing, school climate (including prevention of harassment), disciplinary measures (including suspensions and expulsions), athletics and other nonacademic and extracurricular services and activities, and accessible buildings and technology.

Under Section 504, every student with a disability enrolled in a public charter school must be provided a free appropriate public education–that is, regular or special education and related aids and services that are designed to meet his or her individual educational needs as adequately as the needs of students without disabilities are met.

Charter schools may not ask or require students or parents to waive their right to a free appropriate public education in order to attend the charter school. Additionally, charter schools must provide nonacademic and extracurricular services and activities in such a manner that students with disabilities are given an equal opportunity to participate in these services and activities. Dear Colleague Letter (United State Department of Education, Office for Civil Rights (2014)).

E. The United States Departments of Education and Justice issued a joint guidance document regarding a public school's responsibility to provide effective communication to individuals with disabilities under the IDEA, Section 504 and the Americans With Disabilities Act (ADA), Title II applying to all state and local government entities.

Title II of the ADA requires that public schools ensure that communication with students with hearing, vision or speech disabilities is as effective as communication with students without disabilities. Schools must provide "auxiliary aids and services", if necessary, giving primary consideration to the request of the individual with a disability unless the school provides written justification that it would result in a fundamental alteration of the program, service or activity or in an undue financial and administrative burden. For students who are eligible for IEP services, the auxiliary aids and services required under Title II may be more than what is required in an IEP.

The guidance also clarifies that the Title II requirements apply to other

individuals with disabilities such as parents or member of the public in activities such as parent-teacher conferences, ceremonies and performances. Frequently Asked Questions on Effective Communication for Students With Hearing, Vision or Speech Disabilities in Public Elementary and Secondary Schools (United States Departments of Education and Justice (2014)).

Note: This outline is intended to provide workshop participants with a summary of selected Federal statutory/regulatory provisions and selected judicial interpretations of the law. The presenter is not, in using this outline, rendering legal advice to the participants. The services of a licensed attorney should be sought in responding to individual student situations.